IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

Civil Revision No.34 of 2002.

Judgment reserved on:24.8.2007.

Date of decision: 31st August, 2007.

Bhagat Ram and others ….petitioners.

-Versus-

Bachana and others ….Respondents

Coram:

The Hon'ble Mr.Justice Deepak Gupta, Judge.

Whether approved for reporting? Yes

For the Petitioners: Mr.Ramakant Sharma, Advocate.

For Respondent: Mr.G.D.Verma, Senior Advocate with Mr.Romesh Verma, counsel for respondents 1&2.

Deepak Gupta, J.

This Revision Petition is directed against the order of the Sub Judge Ist Class, Nalagarh dated 4.10.2001 passed in Civil Suit No.414/1 of 1998 whereby he has rejected the application filed by the petitioners herein for amendment of the replication-cum-written statement to their counter claim.

This case has rather unusual facts. The petitioners herein filed a suit before the learned trial Court. This suit was filed under Order 1 Rule 8 CPC for the benefit of the general public of village Jattimajra, Pargana Dharampur, Tehsil Nalagarh, District Solan.

According to the petitioners, a public well had been constructed in khasra No.76 in the said village. The case set up was

that this well had been constructed by the villagers and that the father of the plaintiffs Karam Chand had six shares in the said land. It was averred that the well was constructed 70 years back by the general public for its use. According to the petitioners the respondents had installed a pump machine inside the well and had started irrigating their adjoining land by pumping out the water from the well. This has affected the availability of water from the well to the public and therefore the suit.

The respondents filed written statement and their stand was that the plaintiffs and the other villagers have no connection with the well in question. According to the respondents the well had been constructed by their father Thakaria some time in the year 1941 by spending more than Rs.500/- in silver coins. It was further submitted that this well was constructed in the land which previously bore khasra No.74 and was now khasra No.76. According to the defendants the entries showing Karam Chand to be part owner of this khasra number were manipulated and illegal.

The defendants also filed a counter claim and prayed for a decree of permanent prohibitory injunction restraining the plaintiffs and other villagers from taking water from the well situate in khasra No.76.

Interestingly, this counter claim has neither been separately filed nor is it separately incorporated in the written statement. After the preliminary objections and reply on merits to paras 1&2 of the plaint the respondents incorporated paras CC, 2-A after para 2 of the written statement, Para CC.3-A after para 3 of the written statement

and so on and so forth. The petitioners filed replication-cum-written statement to the counter claim. Thereafter, issues were framed on 18.8.1999. On 7.1.2000 the plaintiffs did not press the suit which was dismissed as not pressed but the counter claim obviously survived. In the meantime the plaintiffs filed another civil suit No.237/1 of 99 titled Bachana and another vs. State of H.P. in which it was alleged that the well in question was in fact situated in khasra No.75 which was owned by the State of Himachal Pradesh. Prayer for consolidation of that suit and the counter claim was made which was rejected.

Thereafter, the present petitioners filed an application under Order 6 Rule 17 CPC for amendment of the replication-cum-written statement to the counter claim. By means of this application the petitioners wanted to bring in new facts. According to the petitioners demarcation has been conducted on the request of the villagers by the Tehsildar Nalagarh and it has been found that the well in dispute is actually situated in khasra No.75 and not in khasra No.76. It was further averred that khasra No.75 was owned by the State of Himachal Pradesh. An objection was also sought to be raised that since the land had been allotted to the State of Himachal Pradesh during consolidation proceedings the Court had no jurisdiction to hear and entertain the counter claim.

This application was contested mainly on the ground that the applicants were withdrawing from their earlier admissions that the well was situated in khasra No.76 and that they could not be

permitted to raise this inconsistent plea. It was averred that a new case is sought to be made.

The learned trial Court rejected this application mainly on the ground that once the petitioners had stated that the well was situate in khasra No.76 they could not be permitted to withdraw this admission made in the earlier written statement to the counter claim and now set up a new plea that the well is situated in khasra No.75 owned by the State of Himachal Pradesh.

Aggrieved against this order the present Revision Petition has been filed.

I have heard Sh.Ramakant Sharma, learned counsel for the petitioners and Sh.G.D.Verma, learned senior counsel for the respondents.

In addition to the pleas raised before the trial Court Sh.G.D.Verma has raised another plea that amendment to the replication cannot be permitted as it is not an amendment to the pleadings. This contention is based on the definition of pleadings as given in Order 6 Rule 1 wherein pleadings have been defined to mean plaint or written statement.

I shall deal with this argument first. The Civil Procedure Code does not envisage the filing of any pleadings other than plaint or written statement. It is only under Order 8 Rule 9 CPC that there is power with the Court to allow any party to file pleadings subsequent to the written statement of the defendant other than by way of defence to a set-off or counter claim. It is obvious that once permission is given under Rule 9 of Order 8 to file subsequent

pleading then this pleading is a pleading within the meaning of Order 6 Rule 1 as well as Order 6 Rule 17 CPC.

Further more, in the present case the amendment is in fact being sought to be made to the written statement to the counter claim. As already mentioned above the counter claim and the written statement to the original suit were inexorably linked together. The respondents themselves had combined the written statement and the counter claim in such a fashion that they both could not be read independently or each other. The replication-cum-written statement to the counter claim was filed in a similar manner. Therefore, in my opinion there is no merit in this objection raised by Sh.G.D.Verma.

It is also contended that in view of the judgments of the Apex Court in **Pandurang Dhondi Chougule and others vs. Maruti Hari Jadhav and others, AIR 1966 SC 153,** and **The Managing Director (MIG) Hindustan Aeronautics Ltd. Balanagar Hyderabad and another vs. Ajit Prasad Tarway, Manager (Purchase and Stores) Hindustan Aeronautics Ltd. Balanagar, Hyderabad, AIR 1973 SC 76,** this Court should not interfere in the order passed by the trial Court. There can be no manner of doubt that in view of the law laid down by the Apex Court this Court shall exercise its revisional jurisdiction and interfere in the order of the trial Court only when there is a jurisdictional error in the order of the trial Court or when the trial Court has acted with material irregularity.

In the present case the petitioners admittedly first stated that the well was situated in khasra No.76 which according to them was

jointly owned by the predecessor of the parties. Now they want to amend the pleadings and submit that the well is in fact situate in khasra No.75 which is owned by the State of Himachal Pradesh. The question is whether the change is such which cannot be brought in by amendment and whether it actually changes the nature of the suit or the real controversy between the parties? In my considered opinion the amendment neither changes the nature of the suit nor changes the real controversy between the parties. The controversy, in a nutshell, was whether the villagers had a right to use the water of the well. The controversy was not whether the well is situated in khasra No.75 or 76. This in my opinion is only an ancillary question but not the crux of the dispute between the parties. Both the parties are ad idem on the issue that there is only one well. Whether the well is situated in khasra No.75 or khasra No.76 is a matter to be decided by the trial Court on the merits of the Case. What is the effect of the well being situated on a particular khasra number will also have to be decided by the trial Court. However the real dispute is only whether the villagers are entitled to use the water of the well for drinking purpose or whether the respondents have the sole right to use the water of the well. Therefore, in my opinion, the judgment in **Ranvir Kochhar vs. Mani Ram, 2002 (1) Cur.L.J.(H.P) 26,** does not apply since according to me this amendment does not change the nature of the suit at all. In fact, in my opinion, this amendment is necessary to decide the real controversy between the parties viz. who is entitled to use the water of the well.

It is also settled law that as far as the inconsistent pleas are concerned a party can be permitted to make amendment in the written statement. In this behalf reference may be made to **Usha Balashaheb Swami and others vs. Kiran Appaso Swami and others, (2007) 5 SCC 602,** wherein the Apex Court held as follows"

> "19.It is equally well-settled principle that a prayer for amendment of the plaint and a prayer for amendment of the written statement stand on different footings. The general principle that amendment of pleadings cannot be allowed so as to alter materially or substitute cause of action or the nature of claim applies to amendments to plaint. It has no counterpart in the principles relating to amendment of the written statement. Therefore, addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the plaint may be objectionable.
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> 22.Keeping these principles in mind, namely, that in a case of amendment of a written statement the courts would be more liberal in allowing than that of a plaint as the question of prejudice would be far less in the former than in the latter and addition of a new ground of defence or substituting or altering a defence or taking inconsistent plead in the written statement can also be allowed, we may now proceed to consider whether the High Court was justified in rejecting the application for amendment of the written statement."

In the present case, as already observed by me above, the amendment being sought is essentially to amend the written statement to the counter claim. As held by the Apex Court even inconsistent pleas can be taken in a written statement and a party can

even be permitted to wriggle out from admission by explaining the admission.

While deciding the case one has to keep in mind that this suit has been filed for the benefit of public at large. It was stated that the well was in khasra No.76. According to the plaintiffs demarcation took place during the pendency of the suit when it was found that the well was actually situated in khasra No.75 owned by the State of Himachal Pradesh. This is a subsequent development and the petitioners have given reasonable explanation to withdraw from the earlier admission.

Keeping in view the aforesaid facts, I am of the considered view that the present Revision Petition has to be allowed and the application for amendment filed by the petitioners for amending their replication-cum-written statement to the counter claim has to be allowed in the terms prayed for. Accordingly, the Revision petition is allowed in the aforesaid terms with no order as to costs.

The parties through their counsel are directed to appear before the trial Court on 10th October, 2007. The Registry is directed to ensure that the record of the trial Court is sent well before the said date.

August 31, 2007. **(Deepak Gupta),**
PV **Judge**